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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NETZAHUALCOYOTL G. RAMOS, Appellant.	2 CA-CR 2009-0062 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081263

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Netzahualcoyotl Ramos appeals from his convictions and sentences for two counts of first-degree felony murder. He first asserts the trial court erred in denying his

motion for a judgment of acquittal claiming there was insufficient evidence to support his convictions. He next contends the court abused its discretion in denying his motion for a new trial after the prosecutor purportedly had engaged in improper closing argument. Last, he claims the court further abused its discretion in admitting other-acts evidence for which the state had failed to give proper notice, and by granting a continuance that resulted in his trial being conducted after the expiration of speedy-trial time limits.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Ramos's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On January 29, 2008, Ramos, Vincent Valenzuela, and Andre Mays went to a residence to meet M., A., and G. and pose as purchasers of marijuana. The three intended to steal the marijuana and brought currency packages showing $20 bills on the top and bottom but containing $1 bills in the middle. Francisco Zavala drove Ramos and Valenzuela to the residence in another person's vehicle. Zavala knew the purpose of the trip was a drug deal but was unaware of the details. Mays drove his vehicle to the residence. Ramos and Valenzuela carried guns. Ramos carried a black "uzi-type" gun that is "bigger than a regular pistol" in a backpack; Valenzuela carried a .45-caliber handgun tucked into his jeans.

¶3 Once at the residence, Ramos instructed Zavala to stay in the vehicle with the engine running and the doors unlocked. Ramos, Valenzuela, and Mays knocked on the front door, and M. invited them in. Ramos asked M., A., and G. to show them the marijuana. M. and G. retrieved from another room a duffel bag containing what appeared

to be four or five bales of marijuana heavily wrapped in plastic. Ramos then asked for a knife to cut the plastic and examine the marijuana, and A. went to the kitchen as if to get one. He returned instead with a gun, demanding of Ramos, Valenzuela, and Mays, "Get me all the money you guys got."

¶4 In the ensuing struggle, Valenzuela hid in the kitchen as he heard an eruption of gunfire. He then ran into another room and, as he was leaving it to enter the living room, he shot A. on the left side of his body after A. pointed a gun at him. Valenzuela saw Ramos shoot G. in the back of the head and, later, shoot A. through the side of his face. Both G. and A. were fatally injured; G. had been shot a total of nine times, and A. had been shot four times. Ramos and Valenzuela then grabbed both the duffel bag containing marijuana bales and another bale that had been placed on the living room table and fled. Mays also fled.

¶5 The state charged Ramos and Valenzuela with aggravated assault of M. and two counts of first-degree murder for the deaths of A. and G. Shortly before trial, Valenzuela pled guilty to two counts of second-degree murder and testified against Ramos at trial. During Ramos's trial, the trial court granted his and the state's joint motion to dismiss with prejudice the charge of aggravated assault of M. After an eight-day trial, the jury found Ramos guilty of two counts of first-degree felony murder. The court sentenced him to consecutive, presumptive terms of life imprisonment without the possibility of parole for twenty-five years. This appeal followed.

Discussion

Insufficient Evidence

¶6 Ramos first contends the trial court improperly denied his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P, because there was insufficient evidence to support the predicate felonies upon which his first-degree felony murder convictions were based. Although we have stated consistently and recently that "we review the [trial] court's denial of a Rule 20 motion for an abuse of discretion," *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009); *see, e.g., State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007), Ramos has asserted, relying on *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), that our review is de novo. In *Bible*, our supreme court stated that "we conduct a de novo review of the trial court's decision [on a Rule 20 motion]." *Bible*, 175 Ariz. at 595, 858 P.2d at 1198. "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Thus, our review is de novo. Our review also is deferential, however, because we view the facts in the light most favorable to sustaining the verdict. *See Bible*, 175 Ariz. at 595, 858 P.2d at 1198.

¶7 A trial court must grant a Rule 20 motion "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d at 1175. Substantial evidence is that which reasonable minds could consider sufficient to establish the defendant's guilt beyond a reasonable doubt. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for

insufficient evidence[,] it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶8 Ramos was convicted of two counts of first-degree felony murder. A person commits felony murder if, "in the course and in furtherance of . . . or immediately [in] flight from" the commission or attempted commission of an enumerated offense, including burglary and robbery, "the [defendant] or another person causes the death of any person." A.R.S. § 13-1105(A)(2); *see also* A.R.S. §§ 13-1507 (second-degree burglary); 13-1508 (first-degree burglary); 13-1902 (robbery); 13-1904 (armed robbery). At the close of the state's case, Ramos requested "a specific offer from the State or finding by the court on the predicate felonies." The state informed Ramos that the predicate felonies upon which the felony murder charges were based were first-degree burglary and attempted armed robbery.[1] The trial court instructed the jury on the offenses of second-degree burglary and robbery, and on attempt, and the jury found Ramos guilty of first-degree murder on the felony murder theory. *See State v. Lopez*, 163 Ariz. 108, 111-12, 786 P.2d 959, 962-63 (1990) (when state alleges multiple predicate felonies, jury verdict need not be unanimous as to which supported felony murder conviction).

[1]The indictment did not charge the predicate felonies of burglary or robbery. Although our supreme court has stated that the state "should include the predicate felony in the original or an amended indictment," *State v. Blakely*, 204 Ariz. 429, ¶ 56, 65 P.3d 77, 88 (2003), "so long as the defendant receives sufficient notice to reasonably rebut the allegation," no constitutional violation occurs. *State v. Rivera*, 207 Ariz. 69, ¶ 12, 83 P.3d 69, 73 (App. 2004). Ramos does not assert he was given insufficient notice here.

¶9 Ramos contends now, as he did below, that there was insufficient evidence to demonstrate he had committed burglary. A person commits second-degree burglary by, inter alia, "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." § 13-1507. A person commits first-degree burglary if the person commits second-degree burglary while knowingly possessing explosives, a deadly weapon, or a dangerous instrument. § 13-1508(A).

¶10 Ramos asserts he could not have committed burglary because he did not enter the residence unlawfully. Instead, he argues, he "entered the victim's home[] at the invitations of the victims[] with the intent to purchase drugs" and "[t]hat invitation was never revoked." But, to "enter or remain unlawfully" means "an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged." A.R.S. § 13-1501(2). Permission to enter does not extend to entry with felonious or larcenous intent. *State v. Embree*, 130 Ariz. 64, 66, 633 P.2d 1057, 1059 (App. 1981).

¶11 Valenzuela testified that he, Ramos, and Mays entered the residence, intending to steal the victims' marijuana. Valenzuela also testified that Ramos was carrying a handgun when he entered the residence. Although the victims indeed had invited them in, that invitation did not encompass their entering with larcenous intent. Ramos further suggests Valenzuela's testimony is not substantial evidence Ramos committed burglary because Valenzuela originally told police he and Ramos had intended to buy, rather than steal, the marijuana. Arguably corroborating Valenzuela's original statement to police, Zavala testified he knew there was going to be a "drug deal"

but did not know whether Ramos, Valenzuela, and Mays were buyers or sellers. The credibility of witnesses is a matter for the jury. *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983). Reasonable jurors could consider Valenzuela's trial testimony sufficient to establish Ramos's guilt beyond a reasonable doubt for the predicate felony of burglary. *See Spears*, 184 Ariz. at 290, 908 P.2d at 1075.

¶12 Ramos also contends there was insufficient evidence to demonstrate he had committed or attempted to commit robbery because "[n]o evidence was presented that [either he or Valenzuela had drawn] their weapons prior to being fired on by the victims or that they drew their weapons in an attempt to take any property from the victims." A person commits robbery if, "in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." § 13-1902(A). A person commits armed robbery if, in the course of committing robbery, such person or that person's accomplice either (1) is armed with a deadly weapon or simulated deadly weapon, or (2) uses or threatens to use a deadly weapon or dangerous instrument or simulated deadly weapon. § 13-1904. A person commits attempt by, inter alia, engaging intentionally in any step in a course of conduct planned to culminate in the commission of the offense or engages in conduct intended to aid another to commit the offense. A.R.S. § 13-1001(A)(2),(3).

¶13 Valenzuela testified that, after A. had demanded money from Ramos, Mays, and him, a gunfight ensued. Valenzuela saw Ramos shoot G. in the head and A. in

the face. Thereafter, Ramos and Valenzuela stole what they thought was the victims' marijuana and fled. Although A. had been the first to draw a weapon, a reasonable jury could conclude Ramos shot G. and A. to prevent their resistance to his taking their property. *See Spears*, 184 Ariz. at 290, 908 P.2d at 1075. There thus was substantial evidence that Ramos had committed the predicate offense of armed robbery. At the very least, a reasonable jury could conclude Ramos had committed the predicate offense of attempted armed robbery because Valenzuela also testified that he, Ramos, and Mays had entered the residence intending to rob the victims and that he and Ramos had been armed. These acts were "step[s] in a course of conduct planned to culminate in the commission of" either burglary or robbery. § 13-1001(A)(2).

¶14 Ramos further argues that, even if there were sufficient evidence to support one of the predicate felonies the state alleged, his conviction nonetheless must be reversed because "there is no way of knowing whether and to what extent the jury based its verdict on one of the alleged crimes for which there was insufficient evidence." Because we find that both predicate felonies of burglary and robbery were supported by sufficient evidence, we reject this argument. Further, the jury was not required to conclude unanimously which of these predicate felonies supported Ramos's first-degree murder conviction. *See Lopez*, 163 Ariz. at 111-12, 786 P.2d at 962-63. Accordingly, because substantial evidence supported Ramos's convictions for first-degree felony murder, the trial court properly denied his Rule 20 motion for a judgment of acquittal.

Prosecutorial Misconduct

¶15 Ramos next asserts the trial court abused its discretion in denying his motion for a new trial, made pursuant to Rule 24.1, Ariz. R. Crim. P., alleging the prosecutor had engaged in improper closing argument. We will not disturb a trial court's denial of a motion for a new trial absent an affirmative showing the court abused its discretion and acted arbitrarily. *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

¶16 "Attorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To warrant reversal, the defendant must demonstrate the improper statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4. A conviction amounts to a denial of due process if there was a "'reasonable likelihood . . . that the misconduct could have affected the jury's verdict.'" *State v. Martinez*, 218 Ariz. 421, ¶ 15, 189 P.3d 348, 353 (2008), *quoting State v. Velazquez*, 216 Ariz. 300, ¶ 45, 166 P.3d 91, 102 (2007); *see also State v. Garcia*, 141 Ariz. 97, 102, 685 P.2d 734, 739

(1984) (defendant cannot demonstrate prejudice if overwhelming evidence of guilt present).

¶17 Ramos contends, as he did below, that the prosecutor committed two instances of improper argument. He first asserts the prosecutor erroneously told the jury during closing argument that Ramos had known of the state's possession of certain pieces of physical evidence connecting him to the crime scene. At trial, the state played recordings of telephone calls Ramos had made while he was in custody in the Pima County Jail. During those calls, Ramos had sought to explain a backpack containing the murder weapon that was found in his closet. He did not attempt to explain, however, either a baseball cap or sunglasses bearing his deoxyribonucleic acid (DNA) that had been found at the scene.

¶18 During closing argument, the prosecutor argued Ramos was aware at the time of the telephone calls that the state possessed the baseball cap and sunglasses. The prosecutor asked the jury, "You don't think [Ramos has] gone over the property sheets and the pictures that were taken from the incident by now? You don't think he recognizes his hat and sunglasses in those pictures . . . ?" The prosecutor then argued that Ramos had not attempted to explain in those calls why his hat and sunglasses were found at the scene because the state had not yet conducted DNA analysis and thus had not yet connected those pieces of evidence to him. The insinuation thus was that Ramos's failure to explain these two pieces of evidence showed intent to conceal the fact that the hat and sunglasses found at the scene were his. But, contrary to the prosecutor's argument, at the time Ramos made the telephone calls from jail, the state had not yet disclosed to Ramos

the property sheets and incident pictures. His silence thus did not necessarily indicate an attempt to conceal that these items were his.

¶19 Ramos also asserts the prosecutor improperly suggested to the jury that the failure of defense counsel to interview M. was evidence of Ramos's guilt. During closing argument, Ramos's counsel asked the jury why the state did not show M. a photographic lineup containing a picture of Ramos when the state had shown M. such a lineup containing a photograph of Valenzuela. Ramos's counsel asked, "They never showed [M.] a lineup of [Ramos]. Why not? And what would have happened if they had? That information is not present." In rebuttal, the prosecutor responded that, although the state could have shown M. a photographic lineup including Ramos, Ramos also could have but did not. He asked rhetorically, "Could it be [that Ramos's counsel did not interview M. because M.] could identify [Ramos]?"

¶20 But Ramos had no right to interview M. under the Victims Bill of Rights without M.'s express consent. *See* Ariz. Const. art. II, § 2.1(A)(5); A.R.S. § 13-4433(A). Ramos in fact had requested both that he be given the opportunity to show M. a lineup of "the third person involved with the shooting" and that he be permitted to interview M., but M. impliedly had declined both requests by failing to respond. The prosecutor's statement thus wrongly suggested defense counsel's failure to interview M. was evidence of Ramos's guilt because M. would have identified Ramos as his assailant.

¶21 In ruling on Ramos's motion for a new trial, the trial court agreed that the prosecutor's arguments had been improper in both instances and constituted misconduct. Nonetheless, the court denied the motion, concluding Ramos had not demonstrated

prejudice. The court detailed the "considerable amount of evidence" establishing Ramos's guilt. For example, during the execution of a search warrant, a police officer found in Ramos's bedroom closet a backpack containing a Cobra, nine-millimeter pistol, which is "larger than a handgun." Subsequent ballistics testing showed the Cobra had fired bullets recovered from A.'s and G's bodies. Moreover, a criminalist testified at trial that DNA test results showed Ramos's DNA was a "major profile" on the sunglasses found at the scene and that Ramos "could not be excluded as a major contributor" of the DNA found on the baseball cap. The court noted that, although Ramos had provided explanations for this evidence, when the jury found him guilty, it implicitly had concluded his explanations were unpersuasive.

¶22 Ramos repeats on appeal the arguments he made in his motion for a new trial. We agree with the trial court that Ramos cannot demonstrate prejudice. The court correctly noted the state had presented considerable evidence establishing Ramos's guilt, which the jury obviously found Ramos had not refuted persuasively. And, in the context of the prosecutor's entire closing argument, these two improper statements were not pivotal. The court instructed the jury that counsels' arguments were not evidence, and we presume the jury followed this instruction. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007). Although Ramos asserts that, "[a]t the very least, it is impossible to be certain that the acts of misconduct did not affect the jury," to warrant reversal, Ramos must demonstrate a reasonable likelihood that the prosecutor's improper statements did affect the jury's verdicts. *See Martinez*, 218 Ariz. 421, ¶ 15, 189 P.3d at

353. Because he has failed to do so, we conclude the court did not abuse its discretion in denying his motion for a mistrial.

Other-Acts Evidence

¶23 Ramos next asserts the trial court abused its discretion by admitting evidence of other acts of which the state had failed to give proper notice pursuant to Rule 15, Ariz. R. Crim P. He does not allege admission of the evidence violated the rules of evidence, specifically Rule 404(b), Ariz. R. Evid. Rather, as best we understand his argument, he contends the court should have precluded admission of the evidence because of its late disclosure by the state. Rule 15.7 provides that a trial court "shall impose any sanction [for a disclosure violation] it finds appropriate." The imposition of sanctions is thus a matter within the sound discretion of the court. *State v. Clark*, 112 Ariz. 493, 495, 543 P.2d 1122, 1124 (1975). "Absent a showing of prejudice to the [defendant]," we will not find an abuse of discretion. *Id.*

¶24 On November 14, 2008, less than thirty days before the scheduled trial date of December 2, 2008, Ramos filed a motion in limine to preclude, inter alia, the state's introducing evidence of his previous drug-dealing transactions, as documented in a journal officers had found during a search of his bedroom dresser. The state had not disclosed its intent to introduce the journal pursuant to Rule 404(b), as evidence of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

¶25 On January 6, 2009, the first day of trial, the trial court precluded admission of the journal, concluding the state had failed to establish by clear and convincing

evidence that Ramos had written the entries. On the second day of trial, however, Valenzuela testified outside the presence of the jury that he knew Ramos kept and documented drug transactions in the journal. The court thus reconsidered its previous decision precluding the journal's admission, concluding Valenzuela's testimony was clear and convincing evidence that Ramos kept and wrote in the journal, thus rendering it admissible. The state subsequently introduced the journal at trial.

¶26 Rule 15.1 requires the state to disclose, not later than thirty days after arraignment, a list of tangible objects and a list of all of the defendant's prior acts it intends to use at trial. Ariz. R. Crim. P. 15.1(b)(5), (7), (c)(1). If the material or information is discovered later than thirty days after arraignment, the state must make additional disclosure seasonably. Ariz. R. Crim. P. 15.6(a). If the state determines additional disclosure may be forthcoming within thirty days of trial, Rule 15.6(b) requires it to so notify the trial court and defendant. If the state seeks to use material or information not disclosed at least seven days before trial, Rule 15.6(d) requires the state to obtain leave of court by motion, supported by affidavit, to extend the time for disclosure.

¶27 Ramos contends the state "failed [to] properly notice the disclosure [of the journal] under Rule 15.1" and "failed to give notice of additional late disclosure pursuant to Rule 15.6(b)." He asserts the state "clearly knew of the [journal]" because it had "sought the skills of a handwriting analyst to determine whether the journal in question was written by [Ramos]." The state had disclosed its list of prospective witnesses, which included a handwriting analyst, on July 11, 2008. Thus, as best we understand it,

Ramos's argument is that the state intended as early as July 11, 2008, to introduce the journal and was required to make additional disclosure of that fact then. Even so assuming, Ramos does not assert he was prejudiced by the state's failure to provide that disclosure. Absent a showing of prejudice, we will not find an abuse of the trial court's discretion. *See Clark*, 112 Ariz. at 495, 543 P.2d at 1124.

¶28 Ramos similarly contends the state had "failed to properly request leave for late filing under Rule 15.6(d)." Rule 15.6(d) requires a party to request leave only when that party seeks to use material or information that it has not disclosed at least seven days before trial. Ramos argued on the second day of trial that he had been prejudiced by the state's failure to file a notice pursuant to Rule 404(b), but the trial court found he had not. Indeed, Ramos filed his motion in limine to preclude the state's use of the journal about two weeks before the original scheduled trial date of December 2, 2008. He thus plainly was aware at that time, which was more than seven days before trial, of the risk the state might use the journal. He does not assert his prejudice argument on appeal. Absent a showing of prejudice, we can only conclude the court did not abuse its discretion in finding none and admitting the journal. *See Clark*, 112 Ariz. at 495, 543 P.2d at 1124.

Speedy Trial Violation

¶29 Ramos next asserts the trial court abused its discretion by granting a continuance that resulted in his trial's commencing two days after the expiration of the speedy-trial limit established by Rule 8, Ariz. R. Crim. P. Rule 8 guarantees a criminal defendant a speedy trial and specifically guarantees a defendant charged with first-degree murder a trial within 270 days from arraignment. Ariz. R. Crim. P. 8.2(a)(3); *see also*

Ariz. Const. art. II, § 24. Rule 8.4 governs exclusions from the computation of speedy-trial time limits, providing in pertinent part that "[d]elays resulting from continuances in accordance with Rule 8.5" are so excluded. Ariz. R. Crim. P. 8.4(e).

¶30 Rule 8.5(b) provides that "[a] continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." *See also State v. Henry*, 191 Ariz. 283, 285, 955 P.2d 39, 41 (App. 1997). We review a trial court's grant of a trial continuance for an abuse of discretion. *State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981). Rule 8.6 clearly states that, upon a technical violation of Rule 8 speedy-trial time limits, the court "shall . . . dismiss the prosecution with or without prejudice." Notwithstanding this provision, and even if a court abused its discretion in granting a continuance beyond speedy-trial limits, we will not reverse a conviction absent a showing of prejudice. *State v. Vasko*, 193 Ariz. 142, ¶¶ 26-30, 971 P.2d 189, 195-96 (App. 1998).

¶31 On November 20, 2008, in response to Ramos's motion to preclude evidence, the state filed a notice of Rule 8 time limits, explaining that Rule 8 time would expire on January 4, 2009, but requesting the trial be continued until January 5, 2009. Thereafter, Valenzuela moved to continue the trial for ninety days, stating he had "not conducted any interview[s]" and was "still waiting on disclosure." Over Ramos's objection, the trial court granted the continuance and reset the trial for January 6, 2009, two days after the ostensible expiration of his speedy-trial time limit.

¶32 The trial court found Valenzuela was not prepared for trial because of his need to complete interviews, stating "delay [is] indispensable to the interests of justice"

and concluding that the two-day delay beyond speedy trial limits would not prejudice Ramos. In finding the continuance "indispensable to the interests of justice," the court did so in accordance with Rule 8.5(b); pursuant to Rule 8.4(e), therefore, the extended time is excluded from the computation of speedy-trial time limits. Although the court did not state explicitly that extraordinary circumstances existed to warrant the delay, it is presumed to know and follow the law, *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994), and Rule 8.5 directs the court to grant a continuance "only upon a showing [of] extraordinary circumstances." Thus, despite the state's apparent concession that "there may have been a strictly technical violation of Rule 8," we conclude Ramos's speedy-trial time limits were not violated.

¶33 Even if the time limits of Rule 8 were violated, Ramos has failed to demonstrate he was prejudiced by the resulting two-day delay in the commencement of his trial. He asserts the prejudice he suffered is clear because, after the trial court scheduled the trial date, the state disclosed additional witnesses and requested documents containing samples of Ramos's handwriting. But Ramos does not assert these additional disclosures and discovery requests prevented or hindered the presentation of his defense. *See State v. Kasten*, 170 Ariz. 224, 227, 823 P.2d 91, 94 (App. 1991) ("The prejudice that a defendant must show to establish an abuse of . . . discretion must go to his inability to present a defense, not to the state's ability to make its case."), *citing State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982). Ramos also contends he was prejudiced because "the State entered into a plea agreement with . . . Valenzuela on December 29, 2008, the terms of which were significantly more favorable than the terms previously

offered, and which were not disclosed to [Ramos]." Again, however, Ramos does not address how his defense was prejudiced as a result. *See id*.

¶34 At the heart of Ramos's allegation of prejudice is his contention that "the request for a continuance was apparently a ruse." He asserts the state was not prepared to go to trial without Valenzuela as a witness and thus "manipulated the system, with the acquiescence of and to the apparent benefit of [Valenzuela]." Ramos cannot demonstrate prejudice by his speculative assertion the state was unprepared for trial. *Vasko*, 193 Ariz. 142, ¶ 22, 971 P.2d at 194. Notably, at the hearing on the motions to continue, the state told the trial court it was "ready to go. We are ready to try this case right now against both these guys. But they are not ready."

¶35 We find nothing apparent in the record that would have suggested to the trial court that such a ruse motivated the state's and Valenzuela's continuance requests. Indeed, Ramos raised no such issue at the hearing on the motions to continue. As Ramos only later asserted in a motion to preclude Valenzuela as a witness, the evidence of this "ruse" was Valenzuela's subsequent failure to conduct the interviews he had claimed he needed more time to complete and the plea agreement he eventually reached with the state. The court had granted the continuance largely on the avowal of Valenzuela's counsel that he was not prepared for trial, and its reliance on counsel's avowal was not an abuse of discretion. *See United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, ¶ 22, 4 P.3d 1022, 1026 (App. 2000) (in granting filing extension, trial court may rely on counsel's avowal notice of entry of judgment not received). Accordingly,

we conclude the court neither erred in granting the trial continuance of which Ramos complains nor violated his Rule 8 speedy-trial rights.

Disposition

¶36 For the foregoing reasons, we affirm Ramos's convictions and sentences for first-degree felony murder.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge